NORAZLEEN MOHAMMED MUSTAFFA v. DR OMAR MD ISA & ANOR

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
BALIA YUSOF WAHI JCA
MOHD ZAWAWI SALLEH JCA
[CIVIL APPEAL NO: P-02-2969-12-2012]
17 MARCH 2015

TORT: *Medical negligence – Duty of Care – Breach of – Standard of care expected of surgeon – Whether surgeon negligent in carrying out surgery – Whether surgeon caused pedicle screws to impinge on to appellant's spinal cord – Whether appellant's paralysis was caused by pedicle screws impinged into spinal cord – Whether non-usage of 'Somatosensory Evoked Potential' monitoring machine amounted to negligence – Whether surgeon took all necessary precaution to avoid injuring appellant during surgery*

TORT: *Medical negligence – Consent – Surgery on spinal cord – Risk of paralysis – Whether surgeon informed patient and/or parents on risk of paralysis prior to surgery – Whether risk of paralysis should have been specifically mentioned prior to surgery*

The appellant was diagnosed as having Adolescent Scoliosis. Accordingly, the first respondent advised the appellant to undergo a surgery as the appellant's spinal cord had curved, and that her condition would only worsen with time. The surgery was done by inserting eight pedicle screws into the appellant's vertebrae. During the surgery, the appellant was instructed to move her hands and legs, to which she was able to move her hands but not her ankles. The surgery was concluded, regardless. A CT scan performed thereafter revealed that the pedicle screws had impinged the plaintiff's spinal cord and consequently caused immobility in her lower abdomen. A second surgery was successfully carried out to remove all the pedicle screws. However, the appellant had no control over her bladder or bowel movement. Consequently, the appellant claimed in the High Court for damages arising from medical negligence alleged to have been committed by the first respondent while treating the appellant, and against the second respondent on the basis of vicariously liability for the negligence by the first respondent, its employee at the material time. However, her claim was dismissed. In the appeal before this court, the main issues to be considered were (i) whether the first respondent was negligent when conducting the surgery on the appellant when he decided not to use the monitoring machine known as 'Somatosensory Evoked Potential' ('SSEP') during surgery; (ii) whether the non-usage of the SSEP was pleaded during trial; and (iii) whether there was a failure by the respondents to inform the appellant or her parents of the risk of paralysis, prior to obtaining their consent to the surgery.

Held (allowing appeal with costs)
Per Mohd Hishamudin Yunus JCA delivering the judgment of the court:

(1) On the issue of whether the non-usage of the SSEP was pleaded, once an inference of negligence could be made, the respondent must explain that there was no breach of duty of care. In this case, the first respondent had already admitted that he did not use the SSEP monitoring machine during the surgery, which was also confirmed by the respondents' expert witness. (paras 31 & 32)

(2) From the evidence of the first respondent, nowhere did he explain that he had taken all precautions when inserting the pedicle screws into the appellant's vertebrae, to ensure that it would not injure the appellant's spinal cord. The first respondent merely gave a narration of the events that took place prior and post the surgery, and attributed the injury caused to the appellant's spinal cord as being caused by the impingement of the pedicle screws. The first respondent had failed to explain the reason for the impingement of the plaintiff's spinal cord by the pedicle screws or the precaution which were taken to prevent or minimise such an injury on the plaintiff. (para 42)

(3) It is for the court, not the medical profession, to determine whether the first respondent was in breach of the standard of care. The expert witness' opinion on the first respondent's clinical judgment was a regress into *Bolam*'s principle, which is no longer the test in determining the standard of care of the medical profession. (para 45)

(4) The first respondent, despite having decided that the SSEP would be required during the appellant's surgery, did not use it and had instead used the wake up test merely because the SSEP was not available on the day of the surgery. The first respondent had failed to adhere to the standard of care expected of a surgeon. The first respondent had failed to explain that he did all that was within his capacity as a medical man to ensure that the plaintiff's spinal cord was not injured by the surgery. His decision not to use the SSEP, especially when he was well appraised with the appellant's condition, and knew that the appellant with her unique spinal deformity, had a higher risk of suffering complications during surgery, showed gross negligence on his part. (paras 49 & 52)

(5) The appellant has successfully proved that the first respondent has failed to inform her and her parents on the risk of paralysis. Nowhere in either the consent forms (exhs. D23 and D25), or the clinical notes of the appellant (exh. D21) was the risks of paralysis, or for that matter, any risks mentioned at all. As the appellant was an athlete, there was all the more reason that the risk ought to have been mentioned clearly. (para 68)

(6) It could not be assumed that just because the 1% risk of mortality was informed to the appellant and her father, therefore the risk of paralysis must have been informed. Such an assumption and simplistic approach could not be made.

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah didiagnos menghidap Skoliosis Remaja. Dengan itu, responden pertama menasihatkan agar perayu menjalani pembedahan kerana tulang belakang perayu telah bengkok dan keadaannya akan bertambah teruk. Pembedahan dijalankan dengan memasukkan lapan skru pedikel dalam vertebrata perayu. Semasa pembedahan, perayu diarahkan untuk menggerakkan kedua-dua tangan dan kakinya, yang mana boleh dilakukan olehnya tetapi tidak buku lalinya. Walau bagaimanapun, pembedahan tersebut ditamatkan. Satu CT Scan yang dijalankan selepas itu menunjukkan bahawa skru-skru pedikel tersebut telah memberi kesan kepada tulang belakang plaintif dan seterusnya menyebabkan kelumpuhan di bahagian abdomen bawah. Pembedahan kedua untuk mengeluarkan skru-skru pedikel telah berjaya dijalankan. Walau bagaimanapun, perayu tidak boleh mengawal pundi kencing atau tinjanya. Oleh itu, perayu menuntut di Mahkamah Tinggi bagi ganti rugi yang timbul daripada kecuaian perubatan yang didakwa dilakukan oleh responden pertama semasa merawat perayu dan terhadap responden kedua atas dasar liabiliti vikarius akibat kecuaian responden pertama iaitu pekerjanya pada masa material. Walau bagaimanapun, tuntutannya ditolak. Dalam rayuan ini, isu-isu utama yang perlu dipertimbangkan adalah (i) sama ada responden pertama cuai dalam menjalankan pembedahan ke atas perayu apabila dia memutuskan untuk tidak menggunakan mesin pemantauan yang dikenali sebagai 'Somatosensory Evoked Potential' ('SSEP') semasa pembedahan; (ii) sama ada ketidakgunaan SSEP diplidkan semasa perbicaraan; dan (iii) sama ada terdapat kegagalan oleh responden-responden untuk memaklumkan kepada perayu atau ibu-bapanya akan risiko kelumpuhan sebelum mendapatkan kebenarannya untuk menjalankan pembedahan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Mohd Hishamudin Yunus HMR menyampaikan penghakiman mahkamah:

(1) Mengenai isu sama ada ketidakgunaan SSEP telah diplidkan, apabila satu inferens kecuaian telah dibuat, responden mestilah menjelaskan bahawa tiada pelanggaran tugas berhati-hati. Dalam kes ini, responden pertama telah mengaku bahawa dia tidak menggunakan mesin pemantauan SSEP semasa pembedahan, yang mana disahkan oleh saksi pakar responden-responden.

(2) Berdasarkan keterangan responden pertama, tidak dijelaskan sama sekali bahawa dia telah mengambil langkah-langkah berjaga-jaga semasa memasukkan skru-skru pedikel ke dalam vertebrata perayu, untuk

memastikan agar ia tidak mencederakan tulang belakang perayu. Responden pertama sekadar menceritakan kejadian-kejadian yang berlaku sebelum dan selepas pembedahan dan mengaitkan kecederaan tulang belakang perayu dengan kesan skru-skru pedikel. Responden pertama gagal mengemukakan alasan bagi kesan skru-skru pedikel pada tulang belakang plaintif atau langkah-langkah yang diambil untuk mengelakkan atau mengurangkan kecederaan tersebut terhadap plaintif.

(3) Adalah mahkamah dan bukan profesion perubatan yang harus memutuskan sama ada responden pertama melanggar tugas berhati-hati. Pendapat saksi pakar mengenai pengamatan klinikal responden pertama berbalik kepada prinsip *Bolam*, yang tidak lagi menjadi ujian dalam memutuskan tugas berhati-hati profesion perubatan.

(4) Responden pertama, walaupun telah memutuskan bahawa SSEP diperlukan semasa pembedahan perayu, tidak menggunakannya dan sebaliknya menggunakan ujian 'wake up' hanya kerana SSEP tidak ada pada hari pembedahan. Responden pertama gagal mematuhi standard penjagaan yang dijangka daripada seorang pakar bedah. Responden pertama gagal menjelaskan bahawa dia telah melakukan segala yang berada dalam kapasitinya sebagai seorang yang berkerjaya dalam bidang perubatan untuk memastikan agar tulang belakang plaintif tidak tercedera akibat pembedahan tersebut. Keputusannya untuk tidak menggunakan SSEP, khususnya apabila dia cukup arif dalam menilai keadaan perayu, dan mengetahui bahawa perayu, dengan kecacatan tulang belakang yang unik, mempunyai risiko yang lebih tinggi mengalami kesulitan semasa pembedahan, telah memperlihatkan kecuaian melampau di pihaknya.

(5) Perayu telah berjaya membuktikan bahawa responden pertama gagal memaklumkan kepadanya dan ibu bapanya akan risiko kelumpuhan. Tidak dinyatakan sama sekali dalam borang-borang kebenaran (eks. D23 dan D25) atau nota-nota klinikal perayu (eks. D21) mengenai risiko-risiko kelumpuhan atau sebarang risiko lain. Oleh kerana perayu adalah seorang ahli sukan, adalah sangat penting risiko tersebut dimaklumkan terlebih dahulu.

(6) Tidak boleh diandaikan bahawa hanya kerana risiko kematian sebanyak 1% telah dimaklumkan kepada perayu dan bapanya, dengan itu risiko kelumpuhan telah dimaklumkan. Andaian dan pendekatan mudah seperti itu tidak boleh dibuat.

Case(s) referred to:

Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118 ***(refd)***
Foo Fio Na v. Dr Soo Fook Mun & Anor [2007] 1 CLJ 229 FC ***(foll)***
Liew Sin Kiong v. Dr Sharon DM Paulraj [1996] 2 CLJ 995 HC ***(refd)***
R Bateman [1925] 94 LBKB 79 ***(refd)***
Rogers v. Whitaker [1992] 109 ALR 625 ***(refd)***

For the appellant - N Ahilan; M/s N Ahilan & Assocc
For the respondents - GK Ganesan (Sharmini Navaratnam & Shalini Ragunath with him); M/s Siva Dharma & Assocs

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-518-2008]

Reported by S Thara

JUDGMENT

Mohd Hishamudin Yunus JCA:

Introduction

[1] The appeal before us emanates from the decision of the High Court of Penang, namely, the decision in Penang High Court Civil Suit No. 22-518-2008.

[2] The appeal is by the plaintiff (the appellant before us) against the decision of the learned High Court Judge dated 9 November 2012 dismissing the plaintiff's claim with costs.

[3] The plaintiff's claim in the High Court was for damages arising from medical negligence alleged to have been committed by the first defendant (the first respondent in this court) while treating the plaintiff. The claim against the second defendant (the second respondent) is on the basis of vicariously liability for the negligence by the first defendant, its employee at the material time.

[4] On 21 July 2014 we allowed the plaintiff's appeal with costs and set aside the decision of the High Court.

[5] Our decision was unanimous.

[6] We now give our grounds for allowing the appeal.

[7] We will begin by setting out briefly the facts of the case.

Facts Of The Case

[8] The plaintiff was an active girl in sports, having represented her state, Penang, in athletics, in numerous competitions, including SUKMA. Her medical condition first came to light in the year 2003 when her athletics coach noticed that her back was unnaturally curved and advised her to seek treatment.

[9] The plaintiff was 14 years old at that time.

[10] The plaintiff first sought treatment at the Penang General Hospital and was later referred by the Penang General Hospital for further treatment to Pusat Perubatan Universiti Malaya, the second defendant (hereinafter referred to as "the hospital"). At the hospital, the plaintiff met the first defendant (DW1), an orthopaedic surgeon, together with one Dr Ng Swee

Soon (DW7), at the former's clinic on 3 October 2003. The plaintiff was accompanied by her parents for the visit and for all subsequent visits at the hospital.

[11] The first defendant examined the plaintiff and she was diagnosed as having a condition known as "Adolescent Scoliosis", a spinal deformity which leads to the spinal cord curving. The first defendant decided to monitor the plaintiff's spinal cord condition and she was given a new appointment date.

[12] The plaintiff came back for her medical appointment with the first defendant as scheduled on 19 March 2004. By then, the first defendant noticed that the plaintiff's spinal cord had curved further as compared to her last visit. The first defendant advised the plaintiff and her parents that surgery would be the best option for the plaintiff, taking into account the fact that the plaintiff was reaching maturity and that her spinal condition would only continue to worsen with time.

[13] The plaintiff and her parents agreed to have the elective surgery proposed by the first defendant.

[14] The surgery was initially scheduled on 11 January 2005.

[15] As the plaintiff was a minor, consent for the surgery was given by her mother on 10 January 2005 by executing the standard consent form provided by the hospital (exh. D23).

[16] However, the surgery could not be performed as scheduled as the hospital was experiencing high volume of patients at the time and did not have a bed at the intensive care unit to accommodate the plaintiff.

[17] The plaintiff was sent home and the surgery was re-scheduled to 30 August 2005. This time, a similar consent form as the one executed by the plaintiff's mother, was executed by the plaintiff's father on 30 August 2005 (exh. D25).

[18] The first defendant performed the surgery on 30 August 2005. The first defendant provided a detailed explanation during examination-in-chief of how the surgery was performed. According to the first defendant, the surgery was done by inserting eight pedicle screws into the plaintiff's vertebrae. Prior to that, the first defendant had identified the exact positions for the insertion of the pedicle screws with the help of a fluoroscopy machine. After inserting the pedicle screws, the first defendant performed what is known as a wake up test, a nerve monitoring system, whereby the plaintiff was instructed to move her hands and legs, to ensure that all her limbs were functioning well. According to the first defendant, the plaintiff was able to move her hands but not her ankles. The first defendant suspected that the pedicle screws could have impinged into her spinal cord. Nevertheless, the first defendant concluded the surgery and the plaintiff was stitched up.

[19] A computerised tomography scan, or more commonly known as a "CT scan", was carried out on the plaintiff immediately thereafter. The CT scan confirmed the first defendant's suspicion, for it revealed that the pedicle screws had impinged the plaintiff's spinal cord and was the cause of the plaintiff being immobile in her lower abdomen.

[20] The first defendant made the decision to remove all the pedicle screws from the plaintiff's vertebrae, and on the same day, the first defendant together with two other doctors, conducted a second surgery and removed all the pedicle screws from the plaintiff's vertebrae.

[21] Unfortunately, even after the second surgery, the plaintiff was unable to move her lower limbs and suffered paralysis. With intense physiotherapy sessions, she regained her ability to walk, *albeit* with a limp. However, to date, she has no control over her bladder or bowel movements.

[22] The plaintiff filed a suit in the Penang High Court against the defendants, contending that the first defendant was negligent for failing to treat her adequately. Since the first defendant was an employee at the hospital at the material time, the hospital was sued on the basis of being vicariously liable for the negligence of the first defendant.

Decision Of The High Court

[23] At the High Court, the learned judge held that the plaintiff had failed to prove negligence against the first defendant, and as such dismissed the plaintiff's claim against the defendants with costs.

The Appeal

[24] Hence this appeal before us.

[25] Before us, two issues were canvassed for our determination, and they are summarised as below:

(a) Whether the first defendant was negligent when conducting the surgery on the plaintiff; and

(b) Whether there was a failure by the defendants to inform the plaintiff or her parents of the risk of paralysis, prior to obtaining their consent to the surgery.

First Issue: Whether The First Defendant Was Negligent When Performing The Surgery On The Plaintiff

[26] On the first issue, it is the plaintiff's contention that the first defendant was negligent in treating her during surgery. The plaintiff's case is premised on the fact that the first defendant, in performing the surgery on the plaintiff, caused the pedicle screws to impinge on into her spinal cord, thereby resulting her paralysis.

[27] The defendants deny that there was any negligence on the part of the first defendant when carrying out the surgery to implant the pedicle screws. Learned counsel for the first defendant contends that the first defendant had carried out the surgery using acceptable surgical procedure and as such the first defendant was not negligent.

[28] During examination-in-chief, the first defendant testified that he had conducted the surgery on the plaintiff using the wake up test, instead of a monitoring machine known as "Somatosensory Evoked Potential" (SSEP). Learned counsel for the first defendant contends that, based on the evidence of the defendants' expert witness, Dato' Dr. Fazir Mohamed (DW5), Head of the Orthopaedic Department, Hospital Kuala Lumpur, at the material time in 2005, the wake up test which was used by the first defendant was an acceptable monitoring method. However, it was asserted by the defendants, that usage of the SSEP was at its infancy stage in Malaysia and that the first defendant had exercised his clinical judgment carefully by deciding to proceed with the wake up test.

[29] It is the defendants' contention that the failure of the first defendant to use the SSEP was not pleaded, hence a non-issue in this case. The first defendant was not challenged by the plaintiff's counsel on his decision not to use the SSEP during surgery. As such, this issue should not be considered by this court.

[30] The learned High Court Judge agreed with the defendants, and held that the issue on the non-usage of the SSEP was never pleaded by the plaintiff. The learned judge held as follows (at p. 37 of the grounds of judgment):

> [68] Isu mengenai SSEP monitoring ini langsung tidak diplidkan oleh Plaintif. Defendan 1 juga tidak dicabar oleh Plaintif mengenai kegagalan Defendan 1 menggunakan SSEP monitoring. Sebaliknya, SD 7 pula yang diasak dengan pertanyaan mengenai SSEP monitoring oleh Plaintif.

[31] With due respect, we are unable to agree with the learned trial judge on the argument that the SSEP was never pleaded. Once an inference of negligence can be made, it is incumbent upon the first defendant to explain that there was no breach of duty of care. In trying to explain to the court that there was no negligence, it was the first defendant who raised the issue about the non-usage of the SSEP.

[32] We also find that it is not fatal for the plaintiff's case that the first defendant was not cross-examined on his decision not to use the SSEP monitoring as the first defendant had already admitted in his examination-in-chief that he did not use the SSEP during the surgery. This also had been confirmed by the evidence of DW5, the defendant's expert witness.

[33] At common law, a doctor is said to owe a duty of care to his patient who is under his care, and this duty arises out of his relationship with his patient. Refer to the case of *R Bateman* [1925] 94 LBKB 79.

[34] In determining the standard of care expected of a doctor, the legal position had been laid down in the English case of *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118 where McNair J, held:

> A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that medical act … Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such practice, merely because there is a body of opinion that takes a contrary view.

[35] However, the *Bolam* principle was rejected by the Federal Court in the case of *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 CLJ 229; [2007] 1 MLJ 593, in which the Federal Court instead adopted the Australian High Court decision in *Rogers v. Whitaker* [1992] 109 ALR 625. Siti Norma Yaakob, FCJ (as she then was), in delivering the unanimous decision of the Federal Court, held (at p. 258 (CLJ); p. 611 (MLJ)):

> [69] Therefore, there is a need for members of the medical profession to stand up to the wrong doings, if any, as is the case of professionals in other professions. In so doing, people involved in medical negligence cases would be able to obtain better professional advice and that the courts would be appraised with evidence that would assist them in their deliberations. On that basis, we are of the view that the *Rogers v. Whitaker* test would be a more appropriate and a viable test of this millennium then the *Bolam* Test. To borrow a quote from Lord Wolfe's inaugural lecture in the new Provost Series, delivered in London in 2001, the phrase '**Doctor knows best**' should now be followed by the qualifying words '**if he acts reasonably and logically and gets his facts right**'.

[36] In *Rogers v. Whitaker*, it was held that the court had a duty to scrutinise the professional practice to ensure that it conforms with the standard set by law, and not leave that duty to be determined completely by the medical profession. In other words, whether the act complained of tantamounts to negligence or not is to be decided by the court, and not the medical profession. The High Court of Australia, headed by Mason, CJ held (at p. 631 of the judgment):

> In Australia, it has been accepted that the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill. But, that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade. Even in the sphere of diagnosis and treatment, the heartland of the skilled medical practitioner, the *Bolam* principle has not been always applied.

[37] Though we are well aware that in *Foo Fio Na*, the Federal Court confined the legal principle of *Rogers v. Whitaker* to a doctor's duty and standard of care in the field of providing advice to a patient on the inherent risks of a proposed treatment, nevertheless, we take the view that for all intent and purpose, the Federal Court would have extended the principle on

the standard of care of a doctor in *Rogers v. Whitaker* to the areas of diagnosis and treatment as well as advice. This is apparent from the fact that in arriving at its decision, the Federal Court referred to case laws from various jurisdictions dealing with the standard of care required of a medical professional in areas of treatment and diagnosis. As such, we are inclined to hold that the *Foo Fio Na* decision ought to apply in the area of not just medical advice, but also to diagnosis and treatment. Therefore, we find that the test of the standard of care which is expected of a medical profession in the realm of diagnosis and treatment, should be a matter of judicial determination as opposed to medical judgment.

[38] Coming back to the present case, from the evidence adduced at trial, it is clear that the paralysis was caused by the implantation of the pedicle screws by the first defendant during the first surgery, which impinged on the plaintiff's spinal cord. This can be found in the report on the plaintiff prepared by the first defendant of the plaintiff (exh. P15), which is reproduced in part below:

> Norazleen telah menjalani pembedahan membetulkan tulang belakangnya pada 30hb September 2005 di Hospital Universiti Malaya.
>
> Beliau telah mengalami komplikasi dimana saraf tunjangnya telah dilukai oleh alat perubatan yang digunakan. Menyedari tentang keadaan tersebut, kami telah mengeluarkan semula semua alat perubatan tersebut.
>
> Pada mulanya beliau telah mengalami lumpuh dari paras pinggang ke bawah.

[39] The first defendant had also admitted that the pedicle screws were the cause of the plaintiff's inability to move her lower limbs, and this can be found in the cross-examination of the first defendant (at pp. 81 and 84 of the notes of evidence):

> S: Setuju dengan saya, pada mulanya saraf tunjang Plaintif dilukai baru Plaintif mengalami komplikasi?
>
> J: Ya.
>
> S: Selepas pembedahan pertama bila awak berjumpa dengan ibu Plaintif, awak kata kepada ibunya adalah urgent untuk implant dikeluarkan jika tidak Plaintif dalam bahaya dan boleh sebabkan kelumpuhan?
>
> J: Saya hanya kata Plaintif akan alami kelumpuhan jika implant tidak dikeluarkan.

[40] The learned High Court Judge had posed further questions on the impingement of the plaintiff's spinal cord by the pedicle screws. The relevant part of the first defendant's testimony, when questioned by the learned High Court Judge is reproduced below (at pp. 97 to 98 of the notes of evidence):

> Mahkamah: Bagaimana impingement of the spinal berlaku?
>
> J: Impingement berlaku apabila implant terkena kepada spinal cord.
>
> Mahkamah: Kenapa berlaku begitu?

J: Ini adalah risiko tinggi, kemungkinan terdapat abnormality pada tulang belakang Plaintif disebabkan scoliosis.

Mahkamah: Bukan disebabkan human error semasa meletakkan implant?

J: Kita gunakan fluoroscope semasa meletakkan implant. Sebelum itu, kita gunakan K wire untuk menentukan tempat untuk masukkan implant. Procedure ini telah dibuat, selepas berpuas hati, barulah implant dimasukkan. Spine Plaintif curve, kemungkinan besar entry point berbeza dari biasa.

[41] Thus, an inference could be made that the first defendant was negligent in carrying out the surgery. The issue that follows then is whether the first defendant has, by evidence, established that, notwithstanding having caused injury to the plaintiff's spinal cord, he was in no way liable in negligence towards the plaintiff.

[42] From the evidence of the first defendant, we note that nowhere in his evidence, did he explain that he had taken all precautions when inserting the pedicle screws into the plaintiff's vertebrae, to ensure that it would not injure the plaintiff's spinal cord. The first defendant merely gives a narration of the events that took place prior and post the surgery, and attributes the injury caused to the plaintiff's spinal cord as being caused by the impingement of the pedicle screws. The first defendant's evidence is reproduced below:

56. Q: Can you explain the cause of the Plaintiff's condition at the end of the said operation?

A: In my view the cause of her condition is attributable to the impingement of the spinal cord by the screws. The impingement of the spinal cord is due to the screws is an uncommon but known complication of this type of operation.

[43] We note that the first defendant failed to explain the reason for the impingement of the plaintiff's spinal cord by the pedicle screws or the precautions which were taken to prevent or minimise such an injury on the plaintiff.

[44] As for the evidence of the defendants' expert witness, DW5, we also do not find his evidence helpful to the defendants' case, in discharging the evidential burden that the risk of injury to the plaintiff's spinal cord was inevitable, or that all precautions had been taken to avoid or minimise that risk of injury. Just like the first defendant, DW5's evidence in essence only touches on the medical procedure carried out by the first defendant, and DW5 attempts to justify that surgical procedure carried out by the first defendant on the plaintiff by saying that such procedure was in accordance with acceptable practice of the medical profession. Reference is made to the medical report of the plaintiff prepared by DW5 dated 7 February 2011, in which DW5 gives his medical opinion on the medical procedure of the plaintiff as below:

A (ii) Pembedahan yang telah dilakukan telah menggunakan **Pedicle Screw** sebagai anchor untuk membetulkan tulang belakang tersebut. Teknik penggunaan pedicle screw seperti yang dinyatakan dalam nota pembedahan pesakit adalah berdasarkan teknik yang diterima pakai oleh pakar-pakar yang telah biasa di dalam melakukan pembedahan tulang belakang bagi kes-kes **Scoliosis** dengan berdasarkan pengetahuan B anatomi dan dibantu oleh mesin flouroscopi (Image Intensifier) semasa pembedahan. Flouroscopi juga digunakan bagi memastikan bahawa pedicle screw yang dimasukkan ke dalam **vertebral body** berada pada posisi yang betul. Berdasarkan kepada laporan CT scan, terdapat beberapa pedicle screws telah memasuki spinal canal di kedudukan T4, T5, T7, T8 dan T9.

C

[45] As we have said earlier in our judgment, whether the first defendant was in breach of the standard of care or not, is for the court to determine and not the medical profession. DW5's opinion on the first defendant's clinical judgment is a regress into *Bolam* principle, and which is no longer the test D in determining the standard of care of the medical profession.

[46] On the evidence, we find that the defendants failed to discharge the evidential burden imposed on them by law, by satisfying this court that the first defendant had taken all precautions during surgery to avoid injuring the plaintiff's spinal cord.

E **[47]** On the contrary, what we have before us is the damaging evidence by the first defendant himself, which clearly shows that he failed to take all precautions to avoid injuring the plaintiff's spinal cord during surgery. This is in the form of his failure to utilise the SSEP monitoring machine during surgery. The first defendant testified in examination-in-chief that he F proceeded with the surgery without the SSEP as the SSEP was not available on the day of surgery, and the plaintiff and her mother were insistent on proceeding with the surgery on that fateful day, regardless as to whether the SSEP was available or not. The first defendant's witness statement is reproduced here:

G Q: Was the SSEP machine available on 30.8.2005?

A: No it was not because it was required by another department.

Q: What did you do?

A: I spoke to the Plaintiff and the mother and gave them the option H to postpone the operation in view of the unavailability of the SSEP machine.

Q: What was their response?

A: They were very adamant and wanted the surgery to proceed as scheduled.

I

Q: What was your decision?

A: As it was accepted practice to conduct this sort of surgery using the wake up call or SSEP monitoring, I used my clinical judgment to proceed with the surgery using the wake up test.

[48] We are unable to accept the first defendant's explanation on his failure to use the SSEP during surgery. We find it unacceptable that the first defendant had allowed the plaintiff and her mother to cloud his clinical judgment to proceed with the surgery in the absence of the SSEP device. What is more glaring is that, prior to the surgery, the first defendant had decided on the SSEP, and had made a note for the availability of the SSEP, as is evident from the first defendant's clinical notes (exh. D21). The clinical notes is re-produced below and it reads:

Admit on Friday 7/1/2005 for op on Tuesday 11/1/2005.

To arrange SSEP on admission.

[49] In other words, the first defendant had decided that the SSEP would be required during the plaintiff's surgery but despite that, the first defendant did not use the SSEP and instead used the wake up test only because the SSEP was not available on the day of the surgery.

[50] We also note that DW5, in trying to justify the first defendant's decision not to use the SSEP, gave evidence to downplay the importance of the SSEP. DW5 testified that between the wake up test and the SSEP monitoring, the wake up test was more accurate and was considered as "gold standard". The SSEP monitoring, added DW5, was relatively new at that time and was not widely used. In other words, the first defendant had followed the accepted standard procedure at the material time by using the wake up test.

[51] However, that was not the reason forwarded by the first defendant to justify his decision to use the wake up test instead of the SSEP. As stated earlier, the first defendant did not use the SSEP because it was not available on the day and that the plaintiff and her mother were adamant that he proceeded with the surgery.

[52] Based on the evidence, we find that the first defendant had failed to adhere to the standard of care expected of a surgeon like him. The first defendant failed to explain that he did all that was within his capacity as a medical man to ensure that the plaintiff's spinal cord was not injured by the surgery. His decision not to use the SSEP, especially when he was well appraised with the plaintiff's condition, and knew that the plaintiff with her unique spinal deformity, had a higher risk of suffering complications during surgery, shows gross negligence on his part. We find that due to the plaintiff's medical condition, there was all the more reasons that the SSEP was necessary and should have been used by the first defendant during the plaintiff's surgery.

[53] As such, we find that the evidence, when taken in totality, is adequate to hold the first defendant liable in negligence. In this regard, with due respect, we disagree with the learned trial judge that the plaintiff had failed to prove negligence against the first defendant.

Second Issue: Whether The Plaintiff And Her Parents Were Informed Of The Risk Of Paralysis Prior To Consenting To Surgery

[54] On the second issue, the plaintiff contends that the defendants ought to be held liable in negligence for failing to inform her and her parents of the inherent risk of paralysis before her parents executed the consent forms.

[55] The law on the duty of a doctor to explain the inherent risks of a proposed surgery to his patient, has been well established and in Malaysia it can be found in the Federal Court case of *Foo Fio Na*. The Federal Court in *Foo Fio Na* was tasked with the duty of determining whether the *Bolam* principle was still the standard of care to be applied in the realm of the duty of care expected of a doctor when informing his patient of the inherent risks of surgery. In answering the issue above in the negative, Siti Norma Yaakob, FCJ (as she then was) held (at p. 246 (CLJ); p. 603 of the judgment):

> [36] That said, we are of the opinion that the **Bolam Test** has no relevance to the duty and standard of care of a medical practitioner in providing advice to a patient on the inherent and material risks of the proposed treatment. The practitioner is duty bound by law to inform his patient who is capable of understanding and appreciating such information of the risks involved in any proposed treatment so as to enable the patient to make an election of whether to proceed with the proposed treatment with knowledge of the risks involved or decline to be subjected to such treatment.

[56] That being the case, it is incumbent for us to examine the evidence closely to determine whether the risk of surgery, in this case paralysis, was informed by the defendants to the plaintiff's parents, to enable them to make an informed election on whether to proceed or otherwise with the surgery on the plaintiff.

[57] In the present case, both the plaintiff (PW1), and her father, Mohammed Mustaffa bin Nagoor Gany (PW2), testified that they were only informed that there was a 99% chance of success of the surgery and a 1% chance of mortality. It is the plaintiff's case that never at any time, was the risk of paralysis informed to her or her parents. The plaintiff's father testified that only DW6, Dr Chong Chee Seang, an orthopaedic and spine surgeon formerly attached with the second defendant, informed him of the risk of the surgery, namely mortality. The plaintiff on the other hand testified that she was informed of the risk of mortality by the first defendant. Both the plaintiff and her father, were certain, that nothing was mentioned by the doctors to them of the risk of paralysis arising as a result of the surgery.

[58] The defendants deny that the risk of paralysis was never informed to the plaintiff or her parents. The defendants at all times maintain that the risk of paralysis was made known to the plaintiff and her parents, and that they were informed of the risk of paralysis before they consented to the surgery.

[59] The first defendant testified that when he proposed surgery to correct the plaintiff's spinal deformity on the second visit of the plaintiff, he explained the risks of surgery as well as the risk of paralysis to the plaintiff and her mother.

[60] One of the defendants' witness, one Dr. Ravindran a/l Thuraisingam (DW2), a medical officer attached to the hospital at the material time, testified that he had explained all the risks of surgery to the plaintiff's mother, including the risks of spinal cord injury and infection, prior to obtaining the plaintiff's mother's consent on the consent form (exh. D23).

[61] DW2's evidence is supported by the testimony of Dr. Jeyakanthan a/l Ratnasingham (DW3), who was a houseman attached to the hospital at the material time. DW3 testified that he had obtained the consent of the plaintiff's father (exh. D25) on 30 August 2005 before the surgery was performed. DW3 further testified that since the plaintiff's surgery was an elective surgery, the risks of surgery would have been informed by the surgeon (that is, the first defendant) to the plaintiff and her parents. His duty, added DW3, was only to confirm that the plaintiff's father was informed of the risks by the surgeon and to ensure that the consent form was executed by the plaintiff's father. DW3 admitted in cross-examination that he did not explain the specific risks of the surgery to the plaintiff's father, as that had been done by the first defendant. DW3 further admitted that the risks of the surgery were not spelt out on the consent form, as it was a standard consent form and the consent form was only a procedure prior to surgery.

[62] DW7, Dr. Ng Swee Soon, a medical officer at the material time, had examined the plaintiff on three occasions, together with the first defendant. DW7 testified that he did not explain the risks of the surgery to the plaintiff as this was usually undertaken by the surgeon, the first defendant. When cross-examined, DW7 testified that he could not remember if the first defendant had informed the plaintiff or her parents of the risks of the surgery.

[63] The learned High Court Judge made a finding that the risk of paralysis was informed to the plaintiff and her parents. The learned judge came to this finding based on the assumption, among others, that for such a major surgery as the one that was performed on the plaintiff, it was impossible and difficult to believe that the first defendant would not have explained the risk of paralysis to the plaintiff and her parents. The learned judge further held that if the risk of mortality, which is a mere 1%, was explained to the plaintiff, it cannot be possible that the risk of paralysis was not explained, what more in a surgery involving the spinal cord. The relevant part of the learned judge's grounds of judgment is reproduced below (at p. 28):

A [50] Adalah sukar untuk dipercayai bagi pembedahan scoliosis yang dianggap pembedahan besar (major), Defendan 1 sebagai pakar ortopedik langsung tidak menerangkan mengenai sifat pembedahan dan risiko pembedahan seperti kelumpuhan kepada Plaintif, ibu dan bapa Plaintif.

[64] Further in the grounds of judgment, the learned judge held (at p. 29):

B [53] Plaintif menyatakan Defendan 1 sendiri beritahunya pembedahan ini ada kemungkinan 1% boleh menyebabkan kematian. Pada pendapat saya, jika risiko kematian ada diterangkan, tidak mungkin pula risiko kelumpuhan tidak dinyatakan apatah lagi pembedahan ini melibatkan saraf tunjang.

C [54] Pada pendapat saya, seawal 19.3.2004, Plaintif, ibu dan bapa Plaintif memang menyedari mengenai risiko kelumpuhan, jika tidak, mana mungkin ibu Plaintif memberi keizinannya dengan menandatangani D 23.

[65] The learned judge also held that even though the consent forms (exhs. D23 and D25) did not state specifically the risks which were informed D to the plaintiff's parents, it did not mean that the risks, including paralysis were not verbally informed. In doing so, the learned judge relied on the High Court decision of *Liew Sin Kiong v. Dr Sharon DM Paulraj* [1996] 2 CLJ 995.

[66] With respect, we are unable to agree with the approach taken by the learned trial judge. Such an approach downplays the importance and purpose E of the consent form, as well as the importance of the duty to warn patients of the inherent risks of the proposed treatment. Moreover, such a liberal approach by the court is open to abuse by medical practitioners.

[67] On the facts in the present case, we find that the plaintiff had successfully proven that the defendants had failed to inform her and her F parents of the risk of paralysis. This is based on the fact that nowhere in either the consent forms (exhs. D23 and D25), or the clinical notes of the plaintiff (exh. D21) was the risks of paralysis, or for that matter, any risks mentioned at all. We do not accept the testimony of the defendants' witnesses, namely, DW5 and DW7 that, as the consent forms were standard G forms, the risks are not mentioned specifically. On the contrary, we find that due to the plaintiff's history as an athlete, there was all the more reason that the risk of paralysis should have been mentioned clearly either in the consent forms or in the clinical notes.

H **[68]** We also find that the learned judge had erred when she made an assumption that just because the 1% risk of mortality had been informed to the plaintiff and her father, therefore the risk of paralysis, which was real and inherent in the surgery for scoliosis, must have been informed to the plaintiff and her parents. We feel that in the absence of any documentary evidence in support of the defendants' case that the risk of paralysis had been I informed, the learned High Court Judge should not have made any assumptions and arrived at such a simplistic conclusion.

Conclusion

[69] For the above reasons, we hold that the first defendant was guilty of negligence in carrying out the surgery and was also negligent in failing to inform the plaintiff and her parents of the inherent risk of paralysis. Consequently, the second defendant is found to be vicariously liable for the negligence of the first defendant.

[70] We therefore allowed the appeal with costs of RM30,000 for here and below and set aside the decision of the High Court. We made an order for damages to be assessed by the Registrar of the High Court.

Appeal allowed with costs of RM30,000, decision of the High Court set aside, damages to be assessed by the Registrar of the High Court.